

\*\*E-Filed 2/11/2008\*\*

NOT FOR CITATION

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

**SAN JOSE DIVISION**

EVERFLOW TECHNOLOGY CORPORATION,  
incorporated under the laws of the Republic of  
China (Taiwan),

Plaintiff,

v.

MILLENIUM ELECTRONICS, INC., a California  
corporation,

Defendant.

Case Number 07-05795-JF

ORDER<sup>1</sup> GRANTING PLAINTIFF'S  
APPLICATION FOR ORDER OF  
WRIT OF ATTACHMENT

Plaintiff, Everflow Technology Corp. ("Plaintiff") moves for an Order granting a Writ of Attachment pursuant to § 483.010 of the California Code of Civil Procedure. The motion is opposed by Defendant Millenium Electronics, Inc. ("Defendant"). The Court has considered the moving and responding papers and the presentations at the hearing on February 8, 2008. For the reasons set forth below, Plaintiff's application will be granted without prejudice to a future application by Defendant to reduce the amount of the attachment.

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<sup>1</sup> This disposition is not designated for publication and may not be cited.

## I. BACKGROUND

Plaintiff is a specialized fan manufacturer located in Taiwan. The fans manufactured by Plaintiff are used by large computer manufacturers that incorporate them into computers, which are sold retail. Defendant is a California corporation located in San Jose, California. It markets cooling systems directly to computer assembly companies for incorporation into the individual personal computer designs sold by those companies.

Defendant used Plaintiff's fans as part of Defendant's cooling systems. Plaintiff entered into a series of agreements to deliver computer cooling products to Defendant. Defendant allegedly agreed to wire payment for each shipment of goods within forty-five (45) days. Plaintiff claims that Defendant ordered goods from Plaintiff and took delivery, but that Defendant has failed to pay in excess of \$2,000,000 owed to Plaintiff.

## II. LEGAL STANDARD

Fed. R. Civ. P. 64 provides that "[a]t the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment. The remedies available under this rule include . . . attachment . . ." Fed. R. Civ. P. 64. "The effect of Rule 64 is to incorporate state law to determine the availability of prejudgment remedies for seizure of property to secure satisfaction of a judgment ultimately entered." *Post-A-Traction, Inc. v. Kelley-Springfield Tire Co.*, 112 F.Supp2d 1178, 1181 (C.D. Cal. 2000).

California Code of Civil Procedure § 481.010 *et seq.* provides the procedures and grounds for obtaining orders granting prejudgment writs of attachment. An order of attachment may be issued only in an action for a claim of money, based upon an express or implied contract, in which said claim is for a fixed or readily ascertainable amount not less than \$500, exclusive of cost, interest, and attorney's fees. C.C.P. § 483.010(a). The claim may not be secured, C.C.P. § 483.010(b), and must be a commercial claim. C.C.P. § 483.010(c). Before an order for attachment is issued, the Court must find all of the following: (1) the claim upon which the

1 attachment is based is one upon which attachment may be issued; (2) the plaintiff has established  
 2 the probable validity of the claim upon which the attachment is based; (3) the attachment is not  
 3 sought for a purpose other than the recovery on the claim upon which the attachment is based;  
 4 and (4) the amount to be secured by the attachment is greater than zero. C.C.P. § 484.090(a).  
 5 The burden is on the moving party to establish grounds for an order of attachment. *Loeb and*  
 6 *Loeb v. Beverly Glen Music, Inc.*, 166 Cal.App.3d 1110, 1116 (1985).

### 7 8 III. DISCUSSION

9 In the instant case each of the requirements of § 483.010 of the California Code of Civil  
 10 Procedure is satisfied. First, Plaintiff has an express contract with Defendant. The contract is a  
 11 wholesale commercial contract wherein Plaintiff has promised to supply Defendant with goods  
 12 on credit, and Defendant has promised to pay Plaintiff within forty-five (45) days for all goods  
 13 received. Second, the invoices supplied by Plaintiff show a total outstanding debt of  
 14 \$1,894,176.27, showing that there is a readily ascertainable amount due and owed. Plaintiff has  
 15 requested a writ of attachment in this amount, as opposed to the total amount of damages alleged  
 16 in the complaint, because it recognizes that the alleged additional debt, which is comprised of  
 17 cancellation charges and retooling charges, is not readily ascertainable. Third, the amount  
 18 sought, exclusive of cost, interest, and attorney's fees, far exceeds the statutory minimum.  
 19 Fourth, the claim is unsecured. Fifth and finally, the attachment is being issued for a claim  
 20 arising out of the conduct by the defendant of a business, thereby making it a commercial claim.

21 Plaintiff also has met each of the requirements of § 484.090. The second requirement of  
 22 § 484.090(a), that the plaintiff must establish the probable validity of the claim upon which the  
 23 attachment is based, merits brief discussion. If the validity of Plaintiff's claim is opposed by  
 24 Defendant "the court must consider the relative merits of the positions of the respective parties  
 25 and make a determination of the probable outcome of the litigation." *Loeb & Loeb v. Beverly*  
 26 *Glen Music, Inc.*, 166 Cal.App. 3d 1110, 1120 (1985).

27 As detailed above, Plaintiff asserts that it contracted with Defendant to supply goods on  
 28 credit. Thereafter, Plaintiff would bill Defendant for the goods provided and Defendant would

1 pay the invoice within forty-five (45) days of its receipt. Plaintiff alleges that it shipped  
2 Defendant goods for over a two year period and that Defendant has failed to pay a majority of the  
3 invoices associated with those goods. Defendant contends that the products in question were not  
4 timely shipped, which resulted in losses to Defendant and its customers, that Plaintiff is  
5 withholding services for which Defendant has already paid, that Plaintiff is making claims for  
6 products that were never shipped, and that the amount that Plaintiff alleges in its application for  
7 order of writ of attachment is incorrect.

8 Plaintiff provides specific information with respect to the contractual relationship  
9 between the parties as well as detailed allegations with respect to Plaintiff's services and  
10 Defendant's subsequent breach. Plaintiff has submitted extensive documentation in the form of  
11 purchase orders, invoices, and a list of all outstanding debts.

12 In contrast, Defendant's assertions with respect to the merits are notably sparse.  
13 Defendant's opposition brief is six sentences in length. The supporting evidence is weak and  
14 subject to numerous evidentiary objections. The declaration of Defendant's president provides  
15 few, if any, specific details. While Defendant claims that shipments of goods were delayed, the  
16 declaration does not state which shipments were delayed, or for how long, nor does it state the  
17 type and amount of losses suffered. Defendant also claims that Plaintiff withheld certain  
18 services, but it provides no evidence to that effect. Finally, Defendant asserts that the amount  
19 that Plaintiff claims it is owed is incorrect. But an exhibit Defendant attaches to its opposition  
20 brief indicates that Plaintiff is owed *at least* \$1,420,897.12.

21 Plaintiff properly objects that the declaration provided by Defendant lacks foundation  
22 because it does not allege that the declarant has personal knowledge of facts contained therein.  
23 Plaintiff also properly objects to Defendant's open invoice as undeniable hearsay. Because  
24 Defendant provides no information on how the document was created, who created, where it  
25 came from, what it purports to prove, or even what it is, it may not be admitted under the  
26 business record exception to the hearsay rule.

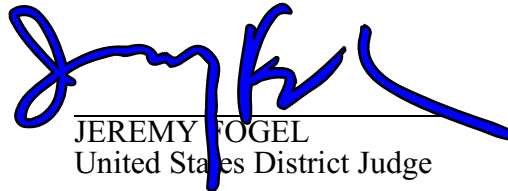
27 Pursuant to the above discussion, and in light of Plaintiff's uncontested assertion that  
28 Defendant's failure to pay its bills may be an indication of ill financial health that may impair

1 Plaintiff's ability to collect damages in the event that it prevails at trial, it is appropriate that a  
2 writ of attachment be ordered in the amount requested by Plaintiff.

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4 **IV. ORDER**

5 For the reasons set forth above, this Court GRANTS Plaintiff's application for a writ of  
6 attachment. An order of attachment in the amount of \$1,894,176.27 shall be issued without  
7 prejudice to a future application by Defendant to modify the amount of the attachment. Plaintiff  
8 shall post the statutory bond prior to issuance of the writ. IT IS SO ORDERED.

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10 DATED: February 11, 2008

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13 JEREMY FOGEL  
14 United States District Judge  
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1 This Order has been served upon the following persons:

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3 Counsel for Plaintiff

4 [Mfang@MarkFangAPC.com](mailto:Mfang@MarkFangAPC.com)

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6  
7 Counsel for Defendant

8 [mrf@structurelaw.com](mailto:mrf@structurelaw.com)